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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-200

FRANCES JAHNER, Executrix of the Estate of Mathias Jahner,
Respondent,

vs.

VALENTINE JACOB,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT A. WOLF
WHEELER, WOLF, WEFALD & DURICK, P.C.
Dakota Northwestern Bank Building
P.O. Box 773
Bismarck, North Dakota 58501
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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STATEMENT OF FACTS

The following additions and changes are made to the Statement of Facts of petitioner. An altercation took place in October 1973 resulting in injuries to Mathias Jahner requiring hospitalization. Upon his release from the hospital, several weeks later, he testified under oath at a preliminary hearing on a criminal assault and battery charge against Valentine Jacob, and was subsequently rehospitalized and died. The transcript of his testimony was admitted in the civil action against Jacob in which he (Jahner) testified that the altercation was started by Jacob and that he was beaten about the head and chest and put on the ground. Defendant Jacob admitted that when Jahner came at him, he grabbed him and turned him around and hit him with his right hand across the

shoulder and neck several times while Jahner was hanging on, as shown in the reprint of the North Dakota Supreme Court decision in petitioner's appendix.

Dr. Albert Fortman, a medical doctor, testified that he observed Mr. Jahner several hours after the altercation at the hospital, and found him to be in considerable pain in the right lateral rib cage, with multiple abrasions and contusions of the head, and a perforated right ear drum. He was unsteady on his feet during his hospitalization and upon his discharge, which indicated damage to his brain and central nervous system. Upon his readmission to the hospital two weeks later, he had suffered what is commonly known as a stroke, which Dr. Fortman described as a manifestation of outward signs of his brain disfunction caused by damage. The partial paralysis, weakness and slurred speech on the right side was consistent with the previously diagnosed brain damage on the left side.

Several days before the trial, hospital and doctors records were made available for examination by Jacob's counsel, and the records were admitted into evidence by the trial court under the Business Records Act. No attempt was made by counsel for Jacob to call any of the doctors whose reports were contained in the medical records. No request was made for continuance to allow Jacob to call such doctors, although a request was made that the trial court subpoena such witnesses to testify, which request was denied. Dr. Fortman testified that the injuries sustained by Jahner at the hands of Jacob required both hospitalizations.

This action was tried to the Court on October 2nd and 3rd, 1974. The trial court's application to the Supreme Court for medical retirement was filed more than eight months after the trial of this action, and the medi-

cal reports submitted therewith indicated the judge's condition as of that time rather than eight months before that. No doctor indicated that the judge, at the time of the trial, had been under medication that left him unable to function.

ARGUMENT

It appears that the main thrust of petitioner's argument in support of this petition arises from his disagreement with the North Dakota Supreme Court's interpretation of the Business Records Act. The hospital records in this case typically included notes and reports of hospital personnel and examining and consulting staff physicians. Particular objection was made to the inclusion of the pathologist's report which Dr. Fortman referred to as a report that confirmed the diagnosis he had initially made and the treatment that he had rendered for the brain damage incurred by Jahner. He testified as to his diagnosis and the consulting physician's reports in relation to his diagnosis. Had no medical doctor testified concerning the diagnosis or treatment of Jahner, or as to the interpretation of the medical reports, petitioner would have had some basis for argument before the North Dakota Supreme Court. But after having failed to alter the firm medical testimony of the physician and having failed in excluding the medical records from evidence, the petitioner made a request to the Court that the Court call these various other doctors to testify. Petitioner did not announce to the Court that subpoenas had been issued by him to call one or several of these doctors, or that a continuance of the trial was therefore requested. Petitioner somehow conveyed the impression that because the Court had admitted the medical records, it was, there-

fore, the Court's responsibility to account for the medical testimony of the doctors whose consultation reports appeared in the records.

North Dakota rules do not require a request to the Court before subpoenas can be issued for the appearance of witnesses at a trial. No request was ever made by petitioner to depose any of the doctors to determine whether their testimony would differ from what is contained in the medical records, nor was there any request made for medical authorizations from Jahner to enable petitioner to confer with the doctors.

The petitioner now attempts to embellish the merits of his position with a dramatic and poetic argument. No attempt is made by him to take serious issue with the sound medical testimony of the attending physician, and who provided the Court with part of the basis for its decision, without regard to medical records or the possible expected testimony of other witnesses. The doctor testified that in treating patients, attending physicians rely upon consultations from various sources in the hospital. His testimony would stand without the medical records. They merely disclosed to the Court what those consultations consisted of in detail. He testified that he, as attending physician, made the final evaluation and determination as to the patient's condition upon consultations he received from other doctors, as well as reports from other hospital personnel and his own observations.

The petitioner questions the propriety of the trial court's decision. But, as the Supreme Court pointed out, he failed to move pursuant to Rule 52 (b), North Dakota Rules of Civil Procedure, to amend the findings of fact or to make additional findings so as to be more specific. Neither did the petitioner move for a new trial under

Rule 59 (b) (6), thereby leaving the findings of the Court as they exist for review by the North Dakota Supreme Court, as well as this Court.

The findings establish that the Court determined that Jacob used greater force than he could have reasonably believed to be necessary to defend himself from any real or apparent danger. These findings support the proposition that the Court was aware of and applied the appropriate rule of law pertaining to reasonableness of force used to repel any real or apparent danger. The North Dakota Supreme Court has long established the rule that the facts as found by the trial court will be upheld on appeal unless they are clearly erroneous under Rule 52 (a), North Dakota Rules of Civil Procedure. The petitioner has not called attention to any portion of the findings which would support a "clearly erroneous" evaluation by an appellate court.

Petitioner has, in effect, asked the Supreme Court of North Dakota and this Court to presume that error was committed by the trial court and construe the record in favor of such a presumption.

Petitioner cites the Juster Bros. case on page 12 of the petition as interpretative of the due process of law clauses of our state and federal constitutions, as standing guarantees of substantial justice. It should be noted that this case turned on the capricious and arbitrary action of the Unemployment Compensation Bureau of Minnesota, which had no rules of procedure or provisions for hearings, totally unlike the procedural guarantees of due process contained in the North Dakota Rules of Civil Procedure.

As to the other issues presented by the petitioner, the respondent will rely upon the authorities cited by the

North Dakota Supreme Court in its decision as contained in the appendix of the petitioner.

Dated this 27th day of August, 1975.

WHEELER, WOLF, WEFALD & DURICK, P.C.
Attorneys for Respondent
Dakota Northwestern Bank Building
Bismarck, North Dakota 58501

By ALBERT A. WOLF